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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

1159

ALUMINUM COMPANY OF AMERICA and REYNOLDS METALS COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Arkansas.

MOTION TO AFFIRM.

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Revised Rules of the Supreme Court of the United States, Rule 16, Paragraph 1 (c) 1

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Come now the Arkansas rail carriers, intervening defendants and appellees in the above-entitled case, and, pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the final judgment of the District Court on the ground that the question presented is so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from a judgment by a statutory three-judge court (United States District Court for the Eastern District of Arkansas—Pine Bluff Division) sustaining and upholding the report of the Interstate Commerce Commission in I. C. C. 34373, **Arkansas Intrastate Freight Rates and Charges**, 326 I. C. C. 19. In its underlying proceeding the Interstate Commerce Commission had found that the involved Arkansas intrastate freight rates and charges caused unjust discrimination against and constituted an undue burden upon interstate commerce and that such unlawfulness should be removed by permitting the application upon Arkansas intrastate rates of the so-called Ex Parte 212 and 223 increases long since applicable upon counterpart interstate rates.

While the report of the Interstate Commerce Commission stated that an order would be entered in the absence of an indication by the Arkansas Commission that the subject increases would be permitted to become effective, such order was never issued. It was unnecessary because the Arkansas Commerce Commission on November 5, 1965, ordered that such increases should be made effective.

The report of the Interstate Commerce Commission, like the Examiner's report which had preceded it, deals in detail with all controlling aspects of this Thirteenth Section proceeding, makes all of the required findings, and reaches the clearly correct conclusion that the unincreased Arkansas intrastate rates failed to contribute their fair share to the railroads' revenue requirements and caused unjust discrimination against and an undue burden on interstate commerce.

As clearly evidenced by the Commission report and as properly found by the Court below, the findings of the

Commission were fully supported by substantial evidence. Indeed, it is clear that an unusually compelling Thirteenth Section case was presented and that it has been correctly evaluated by the Commission and by the District Court.

There is here presented only a single and notably narrow issue. The appeal is presented solely on behalf of two aluminum companies and directs itself to a single movement (crushed limestone used for fluxing in the production of alumina and moving from Myersville, Arkansas—with lesser amounts sometimes moving from the related origin of Limedale, Arkansas, at the same rate—to Bauxite, Arkansas). Essentially, it is appellants' contention that even though the unincreased intrastate rate in question is notoriously low and well below the general level of interstate rates on crushed limestone from, to, and through Arkansas, it may not be here increased because of the mere existence of a **single** interstate rate published on a lower basis to meet a compelling barge competitive situation from Prairie Du Rocher, Illinois, to Baton Rouge, Louisiana.

As will be demonstrated, appellants' contention rests on several apparent misconceptions and is completely without merit. The crushed limestone or fluxing stone movement here under consideration is clearly the most important single movement which was involved in the proceeding before the Commission. Much of the evidence and a substantial part of the Commission's analysis and consideration is devoted to this specific phase of the case. As demonstrated by the Statements of Witnesses Livingston and Kleinsorge, and as is apparent from the Commission's report (J. S. 22a-30a)* and the Opinion of the District Court (J. S. 11a-14a), the fluxing stone situation was perhaps the most compelling example of unlawful failure on

* These references are to pages of the Appendix to Appellants' Jurisdictional Statement.

the part of the Arkansas intrastate rates to bear their fair share of the revenues required by the railroads. No other situation more clearly demanded application of the subject increases in order to remove an unlawful burden on interstate commerce.

The question now presented—which urges comparison, not with the general level of interstate stone rates, but with a single barge-competitive rate in no way affecting appellants—is so obviously without substance as to warrant no further consideration.

ARGUMENT.

We shall hereinafter show that the subject fluxing stone situation compelled the findings and disposition made by the Interstate Commerce Commission; that such disposition clearly rests on the prior existence of unlawful discrimination against and unlawful burden upon interstate commerce (with the Commission's findings as to reasonableness being a necessary incident to its disposition); that the position of appellants has neither substance nor merit; and, further consideration by this Court being unwarranted, the judgment of the three-judge district court should be affirmed.

The "Fluxing Stone" Situation Presents a Most Compelling Example of Unlawful Discrimination Against and Undue Burden on Interstate Commerce.

Not only did this movement of crushed stone for fluxing not bear the Ex Parte 212 and 223 increases which had originally been computed on the theory **that if applied to both interstate and intrastate** traffic they would help to meet, but not entirely eliminate, the carriers' proven revenue needs,[1] but by reason of a "reclassification"[2] during the pendency of an earlier Thirteenth Section proceeding, this movement had escaped or avoided the effect of numerous earlier increases applying generally to interstate and most intrastate traffic.

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[1] 304 I. C. C. 289, 300 (Appendix to Order) and 311 I. C. C. 373, 385 (Appendix A to Order). See also **King v. United States** (1952), 344 U. S. 254, 257.

[2] It must be remembered that the "fluxing stone" used by appellants is merely crushed limestone, which prior to 1956 always moved on the higher crushed stone basis, and which, but for the State Commission's "reclassification", would still be moving at those rates (Original Statement Witness Livingston and his Rebuttal Statement, page 1).

The Commission's report devotes some seven pages to this fluxing stone rate (J. S. 22a-30a). The comparisons there set forth demonstrate without doubt that the subject rate of only $1.38 is very low. Of particular significance is the comparison with the present single line interstate rates of $2.25 and $2.39 (J. S. 25a, see also Exhibit VHL-3 and Statement Witness Livingston, pages 12-13). Based on its careful analysis of the detailed cost material presented of record by both the railroads and the aluminum companies, the Commission also made the very significant finding that **the $1.38 rate was actually below the railroads' out-of-pocket costs of handling this particular traffic** (J. S. 30a). This is not particularly surprising in view of the nature of the movement as described in the Statement of Witness Tompkins and in the Commission report (J. S. 30a). It is, in fact, readily understandable when it is recalled that the $1.38 rate is actually lower than the rate which applied in the depths of the depression (Witness Livingston's Sworn Statement, page 10, Exhibit VHL-2, District Court Opinion, J. S. 12a).

The strikingly low nature of this fluxing stone rate and the compelling nature of the unlawfulness with respect thereto is detailed in the Testimony of Witnesses Livingston and Kleinsorge; it is treated in the argument portion of the railroads' pleadings before the Commission (pages 20-24, railroads' Original Statement of Facts and Argument, pages 23-26, railroads' Reply Statement of Facts and Argument); and, in addition to the previously mentioned extensive attention accorded it by the Commission, it is dealt with at pages 10-13 of the three-judge court Opinion (J. S. 11a-14a). The record leaves no doubt as to the particularly demanding nature of the unlawful situation with respect to the unincreased fluxing stone rate.

The Commission's Conclusions With Respect to the Necessity of Increases in the "Fluxing Stone" Rate Rest on Findings of Unjust Discrimination Against, and Undue Burden on, Interstate Commerce.

One of the fundamental misconceptions running through appellants' Jurisdictional Statement is the expressed view that the Commission's conclusion or disposition with respect to fluxing stone did not rest on a determination of burden on interstate commerce but rather upon the Commission's view as to what constituted a maximum reasonable rate level (see, for example last page (10) of Jurisdictional Statement). There is no basis whatsoever for this confused position.

All of the general analysis, conclusions and findings of the Examiner, as specifically adopted by the Commission (J. S. 19a), as well as the ultimate findings of the Commission, beginning at its page 19 (J. S. 41a), apply to this fluxing stone movement along with other involved movements. Those findings make it clear beyond any doubt that the basic unlawfulness as found by the Commission was the existence of "undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce" (Finding 3, J. S. 41a).

As is always necessary in any Thirteenth Section proceeding, the Interstate Commerce Commission had to consider whether the rates resulting from the subject increases would be reasonable. It is clear that the Interstate Commerce Commission may not order increases to levels which exceed **maximum reasonable** levels. **King v. United States**, (1952), 344 U. S. 254, 274.

Therefore, in addition to its finding of unjust discrimination or unlawful burden, the Commission had to, and did, make the requisite findings as to reasonableness of the resulting rates as increased (Commission's ultimate

Finding 5). However, appellants' contention that the Commission's conclusions with respect to fluxing stone rest on a difference of opinion as to the proper level of maximum reasonableness merely illustrates one of the basic misconceptions upon which the appeal is based. As is the case with all of the other involved commodities, the Commission's jurisdiction over, and basic findings with respect to, the fluxing stone rate rest on the failure of that rate to bear its fair share of the carriers' revenue needs and the resultant unjust discrimination against and undue burden upon interstate commerce. Because the aluminum companies raised so many relatively meaningless comparisons having possible relevance only to the question of reasonableness (the Texas intrastate rates, etc.), the Interstate Commerce Commission was called upon to devote more attention to the secondary or reasonableness question in the case of the fluxing stone than in the case of most of the other movements. Obviously, of course, this **does not mean** that it concluded that the fluxing stone rate had to be increased **because** it was not at a maximum reasonable level.

It is entirely clear that the Commission found the rate had to be increased in order to remove an unlawful burden on interstate commerce, an unjust discrimination against interstate commerce, and that it then found that the increased rate would not exceed a maximum reasonable level. It was in connection with this secondary, but necessary, finding that the Commission correctly considered and rejected the several improper standards of reasonableness (such as intrastate rates in another state, a greatly depressed barge competitive rate which for various reasons was shown to be an inappropriate comparison, etc.).

Appellants' Position Has Neither Substance Nor Merit.

In addition to the previously mentioned basic misconception, appellant makes the wholly untenable argument that the Commission's action with respect to the Arkansas fluxing stone rate was rendered improper by the mere existence of a single barge-compelled rate on a crushed limestone movement from Prairie Du Rocher, Illinois, to Baton Rouge, Louisiana, which movement happened to pass through a part of Arkansas. The facts with respect to that depressed, highly-competitive rate are reported in detail in **Limestone, Prairie Du Rocher, Ill., To Baton Rouge, La.**, 313 I. C. C. 71. They are treated by Witness Livingston at pages 12-14 of his rebuttal statement. That was a situation in which the railroads some years ago had to voluntarily reduce their rate on that single long-distance move in order to avoid losing the entire movement to private barge. The Interstate Commerce Commission merely approved the greatly reduced railroad rate as not being below a **minimum** reasonable level. It is an entirely different situation than the present Arkansas fluxing stone move, as to which, despite the absence of carrier competition of any kind, the rate is at a level so low as not to cover the out-of-pocket costs incurred in that relatively more cumbersome movement involving several interchanges, etc.

The significant fact is that the Arkansas rate is well below the general level of crushed stone rates to, from, and through the State of Arkansas, and even as here increased, it will continue to be well below such general interstate level (Witness Livingston Original Statement, pages 2-13, and Exhibits there referred to). If the mere existence of a single admittedly greatly depressed rate to meet barge competition from an Illinois point to a Louisiana point could have the effect urged by appellants, it would mean that the Interstate Commerce Commission

could not act under its well-recognized Thirteenth Section powers to remove unlawful burdens on interstate commerce and to require intrastate rates to make the same relative prior contributions[3] to the railroads' revenue needs. In a case such as the present one, such untenable theory would presumably nullify the all-important Thirteenth Section power not only in Arkansas but at least also in Illinois and Louisiana, the origin and destination States to and from which the single isolated point-to-point barge competitive rate is published. The only other alternative would be for the carriers to forego a very important interstate movement, which as shown by the Commission's report in the **Prairie Du Rocher** Case, would move by private barge if that rail rate were to be maintained on a higher level.

Obviously, of course, the existence of such single depressed rate cannot have the effect urged by appellants. The appropriate comparison is with the general level of interstate rates. The single barge compelled depressed rate is not a rate with which the Arkansas fluxing stone rate may appropriately be compared. The Commission proceeding which forms the predicate for appellants' entire theory, **South Carolina Intrastate Freight Rates and Charges**, 300 I. C. C. 307, involved, not a single barge-compelled rate from and to points in other states, but an **entire scale or level of lower interstate rates** specifically applying to numerous movements from, to, and within the State in question, South Carolina. Moreover, there was absolutely no question but that both the lower interstate scale and the higher intrastate rate applied to the commodity there in question, pulpwood. As the Commission specifically noted in the present proceeding (J. S.

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[3] Such "prior contribution" test has recognized significance in Thirteenth Section cases; see **Increases in Florida Intrastate Rates**, 278 I. C. C. 41, 67; **Montana Intrastate Freight Rates and Charges**, 284 I. C. C. 167, 203 and numerous similar cases.

27a), the tariff description applicable to the Arkansas stone, which is used in the production of alumina, would not so much as apply to the crushed stone from Prairie Du Rocher, which is used in the alkali industry.[4] Again, as pointed out by the Interstate Commerce Commission, there is no showing of interchangeability of the two types of stone and there is certainly not the slightest suggestion of competitive relationship.

Thus, there are numerous reasons why the barge-compelled Prairie Du Rocher rate is not an appropriate comparison where, as here, the subject Arkansas rate is so far below the general level of interstate rates, so clearly fails to make its appropriate prior contribution to the railroads' revenue needs, so obviously represents perhaps the most compelling instance of the unjust discrimination against, and undue burden on, interstate commerce found here to exist, and which so undeniably will still be well below a maximum reasonable level when increased as contemplated.

It is clear that the Commission correctly evaluated the situation and properly recognized that the Prairie Du Rocher rate constituted an inappropriate comparison for the purposes urged by appellants. As noted by the District Court, this is an area squarely within the particular competence and expertise of the Interstate Commerce Commission, and its analysis and findings are entitled to substantial weight. **Mississippi Valley Barge L. Co. v. United States** (1934), 292 U. S. 282, 286-287; **Board of Trade v. United States** (1942), 314 U. S. 534, 546. The contentions of appellants—based essentially on the mere existence of one rate with which comparison may not even appropriately be made—are as nothing in the face

[4] The Arkansas rate applies only to a commodity meeting the description "Limestone, run of crusher to be used only for fluxing purposes, in the production of Alumina, . . ." (Witness Livingston Original Statement, page 1).

of the Commission's well-reasoned analysis and proper disposition of this compelling situation.

In addition to their untenable attempt to give undue effect to the single competitively depressed Prairie Du Rocher rate, appellants make a number of other observations which illustrate basic misconceptions with respect to the nature and theory of a proceeding of this type. As previously noted, they repeatedly indicate an erroneous belief that the Interstate Commerce Commission was exercising a "maximum reasonableness" power, when it is clear that the Commission action rests on findings of compelling unlawful discrimination against the undue burden upon interstate commerce. On page 5 of the Jurisdictional Statement, appellants set forth two findings which the Commission has allegedly made with respect to the involved fluxing stone. As set forth, they are inaccurate. Not only did the Commission make no such specific findings, but it is clear that we are not here dealing with levels, scales, or multiple rates used by the aluminum industry and the alkali industry. The unquestioned fact is that the **single** Arkansas rate in question is much lower than the general level of interstate crushed limestone rates from and to Arkansas and that the only alkali-industry reference is to a **single** barge-compelled rate which is far below general rate levels and which has no real bearing of any kind on this case.

To suggest, as appellants do on page 9 of their Statement, that there is unlike treatment as between the alkali industry and the aluminum industry is not only completely without factual support, but it is an allegation in no way relevant to this proceeding. There is no showing as to any alkali industry in Arkansas, much less of any competition between appellants and any such industry. Significantly, **any other shipper of crushed limestone, regardless of his industry affiliation** and regardless of whether the shipments were to Arkansas, from Arkansas,

or within Arkansas, would bear applicable rates much higher than those which appellants have long enjoyed.

On the same page 9, appellants also suggest that some sort of discrimination exists because of allegedly lower intrastate rates used by steel companies within Texas. Again, this is not factually accurate (Witness Livingston Rebuttal Statement, pages 1-4). More significantly, the relationship of intrastate rates in one state to those in another has little or no relevancy in a Thirteenth Section proceeding. **Arkansas Intrastate Freight Rates and Charges**, 298 I. C. C. 547, 557. The significant inquiry, as always in such case, is as to the relationship between the intrastate rates in question and the general interstate level on movements to, from, and within the same state. Only thus can it be determined if the unincreased intrastate rates are bearing their proper share of the transportation burden, whether they are making their proper proportionate contribution as compared to their prior contribution before initiation of the subject Ex Parte increases, etc.

Of significance only in that it illustrates appellants' misunderstanding of vital aspects of the case, is the page 6 (of Jurisdictional Statement) contention that the Interstate Commerce Commission has erroneously fixed maximum rate levels and improperly seized jurisdiction from the Arkansas Commission. As already noted, the Interstate Commerce Commission has merely found the existence of unjust discrimination against interstate commerce, that the subject increases must be applied in order to remove such unlawfulness, and that when so treated, the rates will not exceed maximum reasonable levels. This is the clear duty of the Interstate Commerce Commission in a proceeding of this type and on the basis of a compelling record such as here presented. However, the rates are not here "frozen" within the Federal Commission's jurisdiction. To the contrary, the Arkansas Commerce

Commission has authorized the increases before an actual Interstate Commerce Commission order was issued. Hence, the Arkansas Commission retains jurisdiction of the rates. Should it, for example, wish to authorize further increases, it would in no way violate any order of the Interstate Commerce Commission.

On page 8, appellants suggest in passing that since in 1956 the Arkansas Commission prescribed a maximum reasonable rate on this stone, the Interstate Commerce Commission may not require an increase, apparently without regard to the question of how compelling may be the discrimination or burden on interstate commerce. Merely to state this proposition is to show its frailty. Obviously, the significant Thirteenth Section power of the Interstate Commerce Commission may not be nullified by a state commission's designation of a rate as a maximum reasonable rate. As shown by the record, the often-reduced, non-compensatory Arkansas fluxing stone rate was never properly a maximum reasonable rate. However, had it ever properly had such status, this would in no way lessen the Interstate Commerce Commission's power to require its increase in order to remove compelling unlawful discrimination against interstate commerce (found to exist approximately a decade later).

On page 9, appellants ask how a rate wholly within Arkansas can burden interstate commerce. Obviously, every rate ordered increased in every Thirteenth Section proceeding is applicable wholly within some state or another. Such is the nature of a Thirteenth Section proceeding; such is the almost inevitable result of failure on the part of intrastate rates to bear increases found necessary for overall application in order to meet carrier revenue needs. It is the duty of the Interstate Commerce Commission to eliminate such unlawfulness on the basis of a record as here made. In this connection, as elsewhere, appellants seek to compare inappropriate stand-

ards—such as a single depressed rate, or other intrastate rates—when indisputably the proper standard is the general level of interstate crushed limestone rates. The Interstate Commerce Commission has properly recognized the invalidity of appellants' position and contentions.

CONCLUSION.

This is a rather typical Thirteenth Section proceeding in which the Interstate Commerce Commission has properly acted to eliminate a clearly unlawful burden on interstate commerce resulting from the failure of certain Arkansas intrastate rates to bear their fair share of the increased revenue needs of the rail carriers serving that state.[5] Perhaps the most compelling example of unlawfulness was to be found in the point-to-point movement of substantial quantities of crushed limestone used by the appellant companies in the aluminum industry. The record was unusually complete with respect to this commodity. The Examiner who heard the case and the Commission itself dealt with the subject in detail and properly found that this particular movement—long favored by concessions and reductions—had to bear the involved increases in order to eliminate an unlawful burden. The Commission carefully and correctly noted that even when increased the rate would remain much lower than the general level of interstate crushed limestone rates applicable from, to, and within Arkansas. Hence, with indisputable soundness the rate as increased was found not to exceed a maximum reasonable level.

Appellants have presented what amounts to a final effort to avoid bearing a proper proportionate share of

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[5] The Commission has also provided full protection to any individual Arkansas rate situation which might warrant unique treatment (Proviso to Finding 4, paragraph following Finding 6, J. S. 42a). Thus if, contrary to fact, appellants' position had merit, proper recourse would be available before the Commission.

these increases long borne by interstate traffic. Apparently realizing the overwhelmingly impressive showing with respect to their commodity, appellants do not make the usual Thirteenth Section arguments. Instead, they point to a single long-distance, barge-compelled rate from a point in Illinois to a point in Louisiana and argue, in effect, that by reason of such single rate the clearly unlawful Arkansas intrastate situation with respect to their unrelated movements of crushed limestone cannot be rectified. The theory is obviously without substance. If such single rate could have the effect urged by appellants, it would mean that Section Thirteen relief could rarely be obtained with respect to any intrastate rates. It is evident that in virtually every such proceeding there could be produced one or more isolated point-to-point interstate rates which, for the compelling competitive reasons peculiar to those moves, were on greatly reduced levels. But these are not the appropriate comparisons. The Interstate Commerce Commission has properly so recognized and the District Court, upon careful consideration, has correctly sustained the Commission's well-reasoned report.

This appeal presents nothing of substance and hence provides no justification for further review. The judgment of the three-judge court should be affirmed. It is respectfully so moved.

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Certificate of Service.

I, Robert H. Stahlheber, one of the attorneys for the rail carrier appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of April, 1967, in accordance with the governing rules, I served copies of the foregoing Motion to Affirm on interested parties of record, including the following:

1. On appellants by air mailing copies duly addressed with postage prepaid to their attorney, Dickson R. Loos, 888 17th Street, N. W., Washington, D. C. 20006.

2. On the United States of America by air mailing copy with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530.

3. On the Interstate Commerce Commission by air mailing copy postage prepaid to Leonard S. Goodman, Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

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